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STATE OF NEW JERSEY  
DEPARTMENT OF LAW & PUBLIC SAFETY  
DIVISION OF CONSUMER AFFAIRS  
STATE BOARD OF DENTISTRY  
OAL DOCKET NO. BDS 02242-98S

IN THE MATTER OF THE SUSPENSION )	
OR REVOCATION OF THE LICENSE OF: )	Administrative Action
ROBERT WINEGARDEN, D.M.D. )	
License No. DI9721 )	FINAL DECISION AND ORDER
TO PRACTICE DENTISTRY IN THE )	
STATE OF NEW JERSEY )	

This matter was opened before the New Jersey State Board of Dentistry ("Board") by way of a Complaint by the Attorney General against respondent Robert Winegarden, D.M.D., filed with the Board on December 29, 1997. The six-count complaint alleged that, with respect to his treatment of four patients, respondent engaged in repeated acts of gross negligence, gross malpractice and gross incompetence and substantially deviated from accepted standards of dental care, in violation of N.J.S.A. 45:1-21(c) and (d) and N.J.S.A. 45:6-7(d), engaged in the indiscriminate prescription of controlled dangerous substances ("CDS") in violation of N.J.S.A. 45:1-13, and failed to follow the Board's record-keeping regulations in violation of N.J.A.C. 13:30-8.7, all of which constituted professional misconduct in violation of N.J.S.A. 45:1-21(e). In particular, the Attorney General alleged that during the treatment of these four patients, respondent prescribed excessive amounts of CDS and failed to keep proper record of the dates of treatment, amounts of medication prescribed, and the nature of the dental work performed. The complaint also alleged that during a

inspection of the respondent's office, it was discovered that respondent was practicing dentistry with an expired dental license, CDS registration and DEA registration, which constitutes professional misconduct in violation of N.J.S.A. 45:1-21(e). The Attorney General also alleged that the inspection disclosed that respondent was using a toaster oven to sterilize dental instruments, had expired medications in his emergency kit, stored medical waste in a cluttered storage room, in violation of all of the above statutes. Finally, the complaint also alleged that respondent was convicted of a crime of moral turpitude, proving a lack of good moral character, which provided an independent basis for the suspension or revocation of respondent's license to practice dentistry.

Respondent filed an answer with the Board on January 22, 1998. In his Answer, respondent denied that his treatment of any of the patients cited in the Complaint was negligent, he denies that he excessively prescribed CDS to any patient, and asserts that any defect in record keeping or problems revealed in the inspection of his office were minor and immediately cured. Although respondent admitted that he had pled guilty to the crime of failure to make required disposition of property, he denied that it was a crime of moral turpitude.

The Board transferred the case to the Office of Administrative Law on March 9, 1998. Hearings were held before Administrative Law Judge Jeff S. Masin on September 14, 17, and 18, 1998 and December 10, 1998. A motion for summary decision, filed by the Attorney

General prior to the initial hearing date, was also argued during the course of the hearing. The record closed on December 18, 1998, the date of the final hearing. ALJ Masin issued an Initial Decision on February 1, 1999, including his written decision on the motion for summary decision. The Initial Decision is incorporated by reference as if fully set forth herein.

Exceptions were filed by the Attorney General on February 16, 1999. Respondent did not file exceptions. On March 3, 1999, the Board considered the record before it and the exceptions presented, without hearing further argument, and then announced its decision in open session.

Based upon the underlying record, the Board determined to adopt the ALJ's findings of fact on all issues. The Board also adopts most of ALJ Masin's conclusions of law and his determinations as to the appropriate imposition of penalties. However, because of the Board's knowledge and experience in the practice of dentistry, the Board rejects the ALJ's conclusions with respect to the use of the toaster oven, as set forth below. In addition, the Board determined that the period of suspension imposed by the ALJ was insufficient. The Board has also chosen to impose restrictions on respondent for when and if he chooses to reenter the practice of dentistry, and to impose continuing education requirements, to supplement the regular continuing education required biennially.

ALJ Masin's opinion is highly detailed and well-reasoned. However, because the Board has chosen to modify some of his

conclusions, a brief discussion of some of the factual findings by the ALJ is appropriate.

Respondent has been engaged in the practice of general dentistry since 1977. During his years of practice, respondent treated, among other patients, the four patients who were the focus of the first four counts of the Attorney General's complaint: Mr. J.D., Ms. A.C., Mr. P.S. and Ms. V.V. The ALJ's opinion thoroughly discusses the testimony of both respondent and the expert witness presented by the Attorney General, Dr. Paul Desjardins, D.M.D., Ph.D., with respect to the treatment and records of those patients, and the Board adopts that portion of the ALJ's opinion in its entirety. The Board notes that the testimony evidenced a pattern by respondent of indiscriminate prescribing of CDS to these patients and a failure to make adequate records of the treatment provided. The Board agrees with the ALJ's finding that respondent made little or no effort to explore alternative pain management therapies with these patients to the degree required by the standards of professional practice. The Board also agrees with Dr. Desjardins's criticisms of respondent's easy provision of CDS for use in pain control without any thought of the use of non-steroidal anti-inflammatory or other medications or any documentation of his efforts to do so, and his willingness to prescribe CDS based upon telephone conversations without seeing the patient. The Board finds that these actions are all further evidence of respondent's professional misconduct.

The ALJ found that respondent made little or no effort to control the use of CDS by his patients. Although respondent testified that he believed his patients when they said they were in pain, respondent made no effort to determine the degree of pain or to press them to come in for an examination. Respondent also did not inquire how many of the previously prescribed pills were used, how often they were taken, and how many might be left.

ALJ Masin found no evidence of evil intent in respondent's prescribing habits. The Board does not believe the issue of intent to be important to its decision in this case. As ALJ Masin found, however, respondent's conduct was negligent, outside the limits of professional responsibility, and "in some degree uncaring in his lack of careful attention to what was really in the best interests of the patients."

Based upon the facts and findings presented, including the repeated use and overuse of prescriptions for CDS without any attempt to use drugs with less potential for abuse or habituation, and because of the respondent's lack of proper record keeping, the Board strongly agrees with ALJ Masin's conclusion that respondent's treatment of each of the four patients was "professionally deficient, repeatedly and grossly negligent, and outside the allowable boundaries of the applicable standard of care for general dentists practicing in the area."

The Board also agrees with ALJ Masin's determinations on the matters presented in the Attorney General's motion for summary decision. The Attorney General presented a Judgment of Conviction

establishing that respondent was convicted of a single count of theft by failure to make required disposition of property received, in violation of N.J.S.A. 2C:20-9. The Judgment of Conviction was entered on July 10, 1995, in the Superior Court, Middlesex County, Law Division. Respondent was placed on probation for five years, and ordered to pay, among other amounts, \$70,122.23 in restitution.

Respondent does not deny the conviction, nor does he deny the facts underlying the conviction. Indeed, respondent testified concerning these facts in an appearance before the Board in 1995. Briefly stated, respondent was treasurer of his private swim club, and occasionally received funds in the course of his duties. He used some of these funds to pay his personal expenses, including credit card debt. He was not authorized to use these funds for this purpose, and the Board agrees that it is significant that these funds were taken on a number of occasions and over a period of time. Respondent's actions in this regard violated his fiduciary relationship to the other members of the club, violated the trust and moral expectations that the members had for the respondent. The ALJ found, and the Board agrees, that the facts of the conviction and the nature of the breach of trust which the conviction involved were compelling evidence of a lack of moral character, and that therefore the conviction was of a crime of moral turpitude.

As part of the motion for summary decision, ALJ Masin also considered respondent's failure to maintain a license to practice dentistry and his failure to renew his CDS and DEA registrations.

Respondent does not dispute that he continued to practice without properly renewed licenses and that he continued to prescribe CDS without having the proper CDS permit or DEA registration. In mitigation, respondent contended that he sent in his registration forms but never heard anything from the Board or the DEA. Respondent had informed the Board of pending charges in municipal court in Woodbridge, and disclosed it on the application that he sent in. Although it appears that respondent has offered no proof that he sent in these forms, it is clear that after the inspection by the Enforcement Bureau, respondent contacted the Board office, found there was no record of his renewal application, and sent in a new application with the proper fees, and obtained a new license. He similarly renewed his CDS permit and DEA registration. It strains credulity to believe that respondent applied to renew his license, CDS permit and DEA registration and none of them were received. However, even accepting his statements as true, the Board agrees with ALJ Masin that respondent was not properly registered and had no valid documents at the time of the inspection. Respondent was responsible for ensuring that his license was current and that his registrations were valid, but he did not do so, and continued to practice, prescribe and dispense CDS without the proper authority, in violation of N.J.S.A. 45:6-10, N.J.S.A. 24:20-10a and N.J.S.A. 45:1-21e.

Although the Board adopts the ALJ's factual findings with respect to respondent's use of the toaster oven, the Board draws a different conclusion from the facts. Respondent admitted that the

toaster oven was not a commonly used method for sterilization and was not manufactured for use in a medical setting. Respondent believed that the toaster oven, along with his use of a cold sterilizing solution and ultrasonic cleaning was sufficient to sterilize his instruments. Respondent admitted that he conducted no spore testing of the toaster oven. Contrary to practice, only some of respondent's instruments were sterilized in bags; the remainder were simply placed on trays. Instruments that were not bagged for sterilization were also not bagged in his drawers afterwards. Respondent claimed he always placed a bag in the toaster oven to monitor temperature, even when the bag contained no instruments. Respondent noted that paper burns at 450 degrees Fahrenheit, so when the bags started to char and change color, he claimed he knew the proper temperature had been achieved.

The Attorney General offered the testimony of Dr. Desjardin's and the statement of Fotinos Panagakos, D.M.D., Ph.D., a dentist with a Ph.D. in biochemistry and molecular biology. Dr. Panagakos has been the Director of Environmental Safety at New Jersey Dental School for the past five years, and he maintains a private practice in general dentistry. Dr. Panagakos's statement included explanations of three methods of sterilization of instruments. In the case of dry heat sterilization, Dr. Panagakos indicated that all items must be wrapped or bagged in order to ensure maintenance of sterility following sterilization. In addition, he opined that a dry heat sterilization unit must be tested and approved by the FDA as a medical sterilizer. Use of a commercial oven designed for



cooking, such as the toaster oven used by respondent here, is not an appropriate alternative because the insulation and temperature guidelines for commercial ovens are not as stringent as those used for medically approved devices.

As did ALJ Masin, the Board finds the opinions of Drs. Desjardins and Panagakos persuasive, and accepts those opinions. The Board also agrees with ALJ Masin's findings that respondent did not use the proper device to sterilize instruments and could not know that whether the toaster oven was effective in sterilizing his instruments. The Board further finds that respondent's failure to bag all instruments and keep the instruments bagged following sterilization, his failure to do any spore testing or to try to determine the actual temperature being reached by the oven was a gross disregard of public health and safety. Failure to properly sterilize instruments presents a grave risk of cross-contamination: bacteria still existing on an instrument can be introduced into another patient. The Board must therefore conclude that respondent's use of the toaster oven to sterilize instruments constitutes gross negligence in violation of N.J.S.A. 45:1-21(c).

#### Penalties

Although the Board agrees with and affirms the civil penalties, costs and fees imposed by ALJ Masin, the Board does not believe that the period of suspension imposed is sufficient to protect the public or adequately address the breach proven based on the facts presented. Respondent's misconduct and gross negligence demonstrated themselves in a variety of ways: his conviction of a

crime of moral turpitude; his repeated and indiscriminate prescribing of CDS to the four patients at issue, including his failure to require his patients to be examined to determine whether a prescription was warranted; his failure to keep adequate records of treatment; his apparent failure to properly isolate and maintain sterile fields during patient treatment; his lack of understanding of sterilization procedures and use of a toaster oven to "sterilize" instruments; and his practice of dentistry without a valid license, CDS permit or DEA registration. The fact that respondent's misconduct touched so many aspects of practice causes the Board grave concern, and is one reason the Board believes an increased period of suspension is warranted.

The greatest area of the Board's concern, however, is the need to protect the public health, safety and welfare. Respondent has demonstrated a disregard for the health, safety and welfare of his patients in a number of ways. Respondent did not use the proper device to sterilize his dental instruments, and did not verify that his instruments were sterilized through accepted methods such as spore testing. He also failed to bag all the instruments he did attempt to sterilize. His actions in this regard could have led to a grave risk of cross-contamination. Respondent also did not use proper isolation techniques when working on patients, further placing them at risk for bacterial contamination. The emergency kit in his office contained outdated medications. Finally, his overuse of CDS prescriptions without attempting to use other, less addictive pain medications, his willingness to prescribe CDS

without first examining the patient, and his prescription of CDS for simple restorations, removal of trapped food and adjustment of dentures, all leave the Board with serious concerns for the health and safety of respondent's patients.

The mitigating factors presented by respondent and considered by ALJ Masin do not alter the Board's conclusion that an increased penalty is warranted. Respondent cited to his marital problems as well as charges that were brought against him in municipal court as some of the reasons for his failings. In addition, respondent claimed that some continuing education courses that he took, including a course on "Street Drugs", have caused him to reconsider some of his earlier prescribing practices. As the Attorney General notes, respondent took no courses on the proper prescribing of CDS or use of alternative pain medications, in spite of those courses being frequently offered, and it is questionable how a course in "Street Drugs" would affect respondent's treatment of patients. In addition, respondent took three courses in Infection Control, but subsequently used a toaster oven to sterilize instruments, failed to bag instruments, and failed to use proper, accepted isolation techniques. Under the circumstances, the Board agrees with the Attorney General that respondent has not demonstrated that he has integrated the content of these courses into his practice or that his educational efforts should be deemed adequate to mitigate the penalty imposed.

In sum, respondent has committed repeated acts of gross negligence and misconduct. He has exhibited a gross disregard for

the public health, safety and welfare. He has continued to practice dentistry and prescribe CDS without having the proper licenses and registrations. Respondent also committed a breach of fiduciary obligations and violated the public trust, which was conclusively established upon his conviction of a crime of moral turpitude.

The Board believes that taken as a whole, respondent's conduct evidences such a breach of professional standards and the public trust that a stronger penalty is mandated to preserve the integrity of the profession and to protect the public. Thus, the Board determined that the period of suspension suggested by ALJ Masin (three years, with six months of active suspension) should be increased to a period of five years, with two years of active suspension. In addition, the Board has imposed a total of forty-two hours of continuing education in the areas of infection control, drug control and ethics, to be taken in addition to the regularly required continuing education.

In light of the Board's determination to increase the period of suspension imposed upon respondent, before this Order becomes effective, the Board will permit respondent to present additional evidence, not presented below, in mitigation of the penalty imposed, and then will permit the Attorney General a short period of time to respond. Should the Board conclude that any evidence submitted warrants modification of the disposition set forth herein, an amended or supplemental order will issue.

For all the reasons set forth in this final decision and order,

IT IS ON THIS 29<sup>th</sup> DAY OF March , 1999,

ORDERED:

1. Respondent's license to practice dentistry in the State of New Jersey shall be and is suspended for a period of five (5) years. The first two (2) years of that period shall be served as an active suspension, the balance to be stayed, provided respondent complies with the restraints, limitations and other terms set forth herein or further delineated by subsequent Board order. During the period of suspension, respondent shall derive no financial remuneration directly or indirectly related to patient fees paid for dental services rendered by other licensees for patients of respondent's practice. During the period of suspension, respondent shall not adjudicate or otherwise administer any claims in connection with the union dental plan he administers. The attached "Directives Regarding Future Activities of Board Licensee Who Has Been Suspended/Revoked and Use of the Professional Premises" is incorporated into this Order.

2. Upon the completion of the two (2) years of active suspension, respondent shall be granted leave to petition the Board for reinstatement of his license. Respondent must demonstrate to the Board his ability to practice dentistry, including presenting evidence that he has fully complied with the terms of this Order and with his obligations pursuant to his criminal probation. Respondent shall present to the Board a proposal for reentry into

the practice of dentistry under the direct supervision of a Board licensed dentist, who shall be in a position to monitor respondent's practice of dentistry. The Board reserves the right to delineate the specific obligations of the monitoring dentist at the time that it reviews respondent's petition. The monitoring dentist, who must be approved in advance by the Board, will be responsible for submitting quarterly reports to the Board concerning respondent's practice of dentistry.

3. Upon respondent's return to practice, he shall not have any prescription privileges, including the dispensing or prescribing of any controlled dangerous substances.

4. Respondent may not seek modification of this Order prior to one (1) year from his reentry into the practice of dentistry.

5. Respondent shall successfully complete the following continuing education: fourteen (14) hours in infection control, fourteen (14) hours in drug control, and fourteen (14) hours in ethics. These courses, which are in addition to the regularly required continuing education hours, shall be approved by the Board in writing prior to attendance, using the attached pre-approval sheet. The courses must be completed prior to the expiration of the period of active suspension. Respondent shall also complete the attached continuing education report and proof of attendance as proof of successful completion of the required course work. A separate form shall be used for each course. These continuing education requirements are in addition to those credits required for the biennial renewal periods of 1999-2001, and 2001-2003.

6. Respondent shall pay civil penalties totaling \$32,500. That sum reflects a penalty of \$5,000 for respondent's gross malpractice and repeated acts of negligence, as well as his indiscriminate prescribing of CDS as to each of the four patients (J.D., A.C., P.S. and V.V.), for a total of \$20,000; \$5,000 for his gross malpractice and repeated acts of negligence by way of his failure to maintain proper sterilization equipment, in both the use of the toaster oven and his failure to bag instruments to obtain and maintain sterilization, on multiple occasions; \$2,500 for his failure to maintain records in accordance with professional standards and regulatory requirements; \$2,500 for his failure to properly renew his license and registration; and \$2,500 for the possession of outdated medications. Payment shall be made by certified check or money order, payable to the State of New Jersey and forwarded to Agnes Clarke, Executive Director, Board of Dentistry, P.O. Box 45005, Sixth Floor, 124 Halsey Street, Newark, New Jersey 07101, not later than sixty (60) days of the date of this order.

7. Respondent shall pay costs to the State currently determined to be in the amount of \$14,184.08. That sum reflects costs of investigation in this matter in the amount of \$9,249.74; expert witness fees of \$3,681.40, and transcript and hearing costs currently amounting to \$1,252.94. Respondent shall also pay the costs of the transcript of the December 18, 1998 hearing, a statement for which has not yet been provided. A certification setting forth these additional costs shall be submitted by the

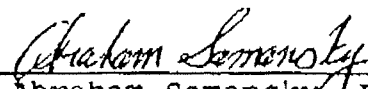
Attorney General within twenty-five (25) days of the entry of this Order. Payment for the aforementioned costs and fees shall be paid by certified check or money order payable to the State of New Jersey and submitted to Agnes Clarke, Executive Director, Board of Dentistry.

8. Should respondent choose not to avail himself of the option to reenter the practice of dentistry in the State of New Jersey at any time during the stayed period of suspension, he must nevertheless, even upon completion of the entire period of suspension, submit a proposal for reentry for Board approval, before reentering the practice of dentistry in this State.

9. This Order shall become final at 5:00 p.m. on the thirtieth day following its entry unless respondent submits, within fifteen (15) days, written evidence of mitigation not submitted to nor considered by the ALJ. In the event that respondent provides additional written evidence, the Attorney General shall have ten (10) days to provide a written response. All submissions should be sent to Agnes M. Clarke, Executive Director, State Board of Dentistry, P.O. Box 45005, 124 Halsey Street, Newark, New Jersey, 07101.

New Jersey Board of Dentistry

By:

  
Abraham Samansky, D.D.S.  
President